Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

FRANK SANDERS,

Petitioner,

v.

VILLAGE OF DIXMOOR,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Do the Federal Rules of Civil Procedure require the filing of a motion to reconsider to preserve for appellate review a district court's error in granting a motion for summary judgment?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Frank Sanders respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on May 13, 1999.

OPINIONS BELOW

The decision of the Court of Appeals (App. 1-6) and the opinion of the district court (App. 9-15) are unreported.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254: The judgment of the court of appeals (App. 7) was entered on May 13, 1999; a timely petition for rehearing was denied on June 16, 1999. (App. 8.)

STATUTE INVOLVED

This case involves Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e.

STATEMENT

"Nigger, you're suspended" were the words spoken by respondent's Caucasian police chief when he suspended petitioner, an African-American, from his position as a part-time police officer.

Petitioner brought suit in the district court under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e et seq., alleging that he had been suspended because of his race. Respondent moved for summary judgment, arguing, *inter alia*, that petitioner's "suspension was due to his insubordination and not his race." Plaintiff opposed the motion, relying on the words spoken by respondent's police chief as establishing a triable issue as to whether the suspension was racially motivated. Respondent answered this argument by asserting that the language used by the police chief in suspending petitioner did not amount to "even a 'nugget' of evidence" that race had been a factor in the suspension.

The district court granted summary judgment for defendant, concluding that "[p]laintiff does not argue that he was suspended because of race." (Pet.App. 12.) A divided panel of the Seventh Circuit affirmed, concluding that plaintiff waived his claim that he was suspended because of his race because he had not "notif[ied] the trial court" of this theory. (Pet.App. 3.) The panel majority acknowledged that the district court had misapprehended petitioner's claim, but concluded that before appealing, petitioner should have filed a "Rule 59 motion to reconsider, [to] notify the court that it should address his argument concerning discriminatory treatment." (Id.)

REASONS FOR GRANTING THE WRIT

The rule applied by the Seventh Circuit to deprive petitioner of the remedy created by Title VII is a vast departure from the accepted and ordinary summary judgment procedure that requires correction by this Court.

The Caucasian police chief who suspended petitioner used the "the most noxious racial epithet in the contemporary American lexicon." *Montero v. Tempe Union High School District,* 158 F.3d 1022, 1033 (9th Cir. 1998). This despicable language is direct evidence of race discrimination, *Wilson v. City of Aliceville,* 779 F.2d 631, 633 (11th Cir. 1986), and, as the dissent below recognized, should be "enough to create a triable issue as to whether Sanders was suspended because of his race." (Pet.App. 6.)

Petitioner relied on this direct evidence of race discrimination to oppose respondent's motion for summary judgment, which squarely placed in issue petitioner's claim that he had been suspended because of his race. Respondent argued in its summary judgment papers, *inter alia,* that petitioner's "suspension was due to his insubordination and not his race." Respondent answered petitioner's reliance on the racial epithet, asserting that utterance of "Nigger, you're suspended" did not provide "even a 'nugget' of evidence" that race had been a factor in the suspension.

In deciding respondent's motion for summary judgment, the district court disregarded the established and well settled principle recently restated by this Court in *Hunt v. Cromartie,* 119 S.Ct. 1545 (1999), that "in ruling on a motion for summary judgment, the nonmoving party's evidence 'is to be believed, and all justifiable inferences are to be drawn in [that party's] favor.'" Notwithstanding the agreement of the parties that petitioner's claim was that he been suspended because of his race, the district court failed to consider this issue, stating that "[p]laintiff does not argue that he was suspended because of race." (Pet.App. 12.)

The Seventh Circuit refused to correct the district court's error. In the view of the panel majority, petitioner could not complain of the district court's error because he had not filed a "Rule 59 motion to reconsider, [to] notify the court that it should address his argument concerning discriminatory treatment." (Pet.App. 3.)

The accepted and ordinary rule is that a final order granting summary judgment is reviewed de novo, "without relying on the lower court's understanding." *Eastman Kodak v. Image Technical Services,* 504 U.S. 451, 465 n.10 (1992). The Rules of Civil Procedure do not require (or even encourage) the filing of a motion for reconsideration as a prerequisite to appeal the erroneous grant of summary judgment. The decision of the Seventh Circuit flies in the face of this rule and, if allowed to stand, would encourage all losing litigants to impose on the limited resources of district court a motion to reconsider in every case.

This Court has rejected several proposed barriers to civil rights litigants. The Court has refused to require that policy claims be pleaded with "particularity." *Leatherman v. Tarrant County,* 507 U.S. 163 (1993). The Court has also

declined to require clear and convincing evidence to establish a unconstitutional motive. *Crawford-El v. Britton*, 118 S.Ct. 1584 (1998). The new procedural hurdle fashioned by the Seventh Circuit is cut from the same cloth as these rejected barriers and should likewise be rejected.

CONCLUSION

It is therefore respectfully submitted that the petition for writ of certiorari should be granted.

September, 1999

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APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 98-3

FRANK SANDERS,

Plaintiff-Appellant,

VILLAGE OF DIXMOOR,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 97 CV 8200—**George W. Lindberg** *Judge.*

ARGUED February 24, 1999—DECIDED May 13, 1999

Before EASTERBROOK, MANION, and EVANS, Circuit Judges.

Manion, Circuit Judge. Frank Sanders sued the Village of Dixmoor, Illinois under Title VII of the Civil Rights Act, alleging racial discrimination due to discriminatory treatment and hostile environment. The district court granted Dixmoor summary judgment, concluding that Sanders failed to present sufficient evidence of a severe and pervasive hostile environment. The court did not address the discriminatory treatment issue, nor did the plaintiff move post- trial for the court to address that issue. Sanders appeals. We affirm.

Frank Sanders is a black male. He worked approximately four days per month for the Village of Dixmoor as a part-time police officer from 1991 until April of 1997. In 1997 the Village elected a new mayor. The Village Council replaced police chief Nicholas Graves with Joseph Falica. Sanders, who supported his good friend Graves, was not pleased with Graves' termination. When

Graves and Falica met at the station to discuss the transition. Sanders was also present. He interrupted the discussion several times, demanding to know from Falica the new scheduling arrangements and what Sanders' particular role would be. Falica responded a couple of times, saying that the time was not appropriate to discuss the matter with Sanders. When Sanders persisted, a heated exchange followed, culminating with Falica exclaiming, "Nigger, you're suspended." Falica then ordered Sanders out of the police station, but Sanders responded that he wasn't going anywhere. Falica reiterated, "[y]ou're suspended for 90 days." Sanders left and never returned. After exhausting his administrative remedies, he filed suit against the Village of Dixmoor under Title VII, alleging that "[t]he Chief of Police did not have any basis, other than plaintiff's race, to order plaintiff's suspension."

Dixmoor moved for summary judgment, arguing that Sanders had failed to present sufficient evidence of a hostile work environment based on race. Dixmoor also presented evidence and argued that Sanders was fired because of his insubordination, not because of his race. In a (barely) three-page reply brief, Sanders cited two cases for the proposition that the use of the word "nigger" alters the terms and conditions of employment. The district court granted Dixmoor summary judgment, concluding that the only evidence Sanders had presented of a hostile environment was Falica's statement "Nigger, you're suspended," and that this one instance of racial harassment was not sufficiently severe or pervasive to alter the conditions of employment and create an objectively hostile work environment.

Notably, the district court did not address the issue of whether Falica's use of "nigger" during the verbal altercation with Sanders was direct evidence of race discrimination in the suspension. In fact the district court concluded that "[p]laintiff does not argue that he was suspended because of his race or that using the word 'nigger' amounted to

constructive discharge." More notably, Sanders did not at the time the court rendered its opinion, nor through a Rule 59 motion to reconsider, notify the court that it should address his argument concerning discriminatory treatment. Instead, Sanders now appeals the district court's decision granting Dixmoor summary judgment. However, he does not challenge the district court's conclusion that he failed to present sufficient evidence of an objectively hostile environment.[1] Rather, Sanders contends that summary judgment was inappropriate because he presented sufficient evidence that he was suspended because of his race. But as noted, the district court did not address this issue.

While Sanders' complaint was framed broadly enough to include a claim of a racially motivated suspension, at the summary judgment stage Sanders failed to alert the district court to this theory. "It is a well-settled rule that a party opposing a summary judgment motion must inform the trial judge of the reasons, legal or factual, why summary judgment should not be entered. If it does not do so, and loses the motion, it cannot raise such reasons on appeal." *Liberles*

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1. In an amicus brief the EEOC presents two arguments. Unlike Sanders' brief, the EEOC claims the district court erred by holding that the circumstances surrounding Falica's use of the word "nigger" were not sufficient to create a racially hostile work environment. But since Sanders did not raise the issue on appeal, the Commission has no party to support. In its argument asserting race discrimination the Commission claims it was the defendant who did not raise with the district court the race-based suspension claim. But as explained above, Dixmoor did make this argument and the plaintiff cannot sit idly by while the court states that the plaintiff is not asserting race-based suspension or constructive discharge. The issue was waived below.

v. County of Cook, 709 F.3d 1122, 1126 (7th Cir. 1983). Here, Dixmoor moved for summary judgment arguing that Sanders had failed to present sufficient evidence of a hostile environment claim, and that his suspension was due to his insubordination and not his race. Sanders' response failed to address the issue of the suspension and instead focused on the use of the word "nigger," citing cases for the proposition that the word created a hostile environment in and of itself. Because Sanders did not notify the trial court to the theory he now advances--that he was suspended because of his race--he has waived any such claim there and on appeal. We therefore AFFIRM the district court's grant of summary judgment to Dixmoor.

Evans, Circuit Judge, dissenting. Joseph Falica, the newly appointed chief of police for the Village of Dixmoor, suspended Frank Sanders, a part-time police officer with the Village, with (according to Sanders) this send-off: "Nigger, you're suspended." Sanders sued, summarily recounting the exchange in his skimpy (2-page) complaint and alleging that Falica "did not have any basis, other than plaintiff's race, to order plaintiff's suspension." Sanders further alleged that Falica's outburst and the ensuing suspension "deprived [him] of rights secured by Title VII." The district court granted summary judgment for the Village, finding that Sanders "fail[ed] to satisfy the objective prong of the hostile work environment enquiry, and consequently fail[ed] to demonstrate an actionable claim of racial harassment under Title VII." Central to the court's holding was its conclusion that Sanders was asserting a racial harassment, not a racial discrimination, claim. On appeal, Sanders says (but inexplicably only in a footnote) that the court incorrectly construed his claim; he was claiming discrimination, not harassment. He does, however, argue repeatedly that Falica's use of "the most noxious racial epithet in the contemporary American lexicon" was direct evidence of racial discrimination.

A plaintiff in an employment discrimination case can avert summary judgment in two ways. First, he can offer enough evidence (whether direct or circumstantial) to create a triable issue of whether the adverse employment action of which he complains had a discriminatory motivation. Or, he can proceed under the McDonnell Douglas burden- shifting mode of proving a case. *Wallace v. SMC Pneumatics, Inc.*, 103 F.3d 1394, 1397 (7th Cir. 1997). Sanders went the first route. He claimed, though very inartfully, that Falica's statement — "Nigger, you're suspended" — was direct evidence that Falica suspended him because of his race. Wallace provides solid support for such a claim.

Robert Wallace, an American, worked for an American subsidiary of a Japanese corporation. After Wallace botched a project, his general manager, David Robinson (also an American), fired him. Shortly before Wallace was fired, the director of the subsidiary, Fusao Takehashi (who was Japanese), said to Wallace: "all Americans are stupid." Wallace sued under Title VII and lost on summary judgment. We affirmed because Wallace demonstrated no link between Takehashi's racially charged insult and Robinson's decision to fire Wallace. Chief Judge Posner, however, with eerie foresight, noted:

> If Takehashi had fired Wallace after making this statement, Wallace would have made out a prima facie case (wholly apart from McDonnell Douglas), that is, a strong enough case to go to a jury rather than being resolvable by the grant of a directed verdict to the defendant. Id. at 1399.

The district court never considered whether Falica's statement could support a claim of discrimination. Instead, the court analyzed Sanders' claim as one of harassment and concluded that this single incident wasn't enough to alter Sanders' conditions of employment. That conclusion may be

right, but the court's analysis plays no role in the assessment of a discrimination claim. Though Sanders should have pushed his discrimination claim with more clarity, we should, nevertheless, be able to easily tease a discrimination claim out of what he did, in fact, allege. And the district court, I think, was wrong to brush the claim off so easily. In addition, the decision to characterize Sanders' claim as one of harassment alone is baffling because the Village moved for summary judgment as if discrimination, not harassment, was alleged. The Village never mentioned harassment. In short, the district court granted summary judgment to the Village on a claim not even it recognized and barely addressed the claim both parties seemed to think was at issue, although admittedly Sanders' counsel did a masterful job of camouflaging what he was trying to do.

Perhaps Sanders should have sought further relief in the district court before turning to us. That, it seems, would have been a wise course to pursue. And of course Sanders would, in any event, face an uphill battle convincing a trier of fact that Chief Falica actually said "Nigger, you're suspended."[2] But if Falica, a white man, used "Nigger," as vile a racial epithet as has ever been uttered, in the same sentence as a suspension order, that, in my view, is enough to create a triable issue as to whether Sanders was suspended because of his race. Accordingly, I dissent.

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2. The Village conceded, as it had to, Sanders' version of events for purposes of its summary judgment motion, so a credibility issue wasn't before the court.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 98-3

FRANK SANDERS,

Plaintiff-Appellant,

VILLAGE OF DIXMOOR,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 97 CV 8200—**George W. Lindberg** *Judge.*

[May 13, 1999]

JUDGMENT — WITH ORAL ARGUMENT

Honorable Frank H. Easterbrook, Circuit Judge
Honorable Daniel A. Manion, Circuit Judge
Honorable Terence T. Evans, Circuit Judge

The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this date.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 98-3

FRANK SANDERS,

Plaintiff-Appellant,

VILLAGE OF DIXMOOR,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 97 CV 8200—**George W. Lindberg** *Judge.*

[June 16, 1999]

Before

Honorable Frank H. Easterbrook, Circuit Judge
Honorable Daniel A. Mannion, Circuit Judge
Honorable Terence T. Evans, Circuit Judge

On consideration of the petition for rehearing and suggestion for rehearing en banc filed by Plaintiff-Appellant on May 27, 1999, no judge in active service has requested a vote thereon and all of the judges on the original panel have voted to deny the petition. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

FRANK SANDERS,
Plaintiff,
No. 97 CV 8200 v.

VILLAGE OF DIXMOOR,

Defendant.

MEMORANDUM OPINION AND ORDER

Plaintiff, Frank Sanders, filed a complaint alleging defendant, the Village of Dixmoor, Illinois, racially discriminated against plaintiff in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e)-2. Defendant has moved for summary judgment.

Summary Judgment will be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P.56(c). When a court reviews a motion for summary judgment, it must view all the evidence in the light most favorable to the non-moving party, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251 (1986), drawing all possible inferences in favor of the non-moving party. *Associated Milk Producers, Inc. v. Meadow Gold Dairies, Inc.*, 27 F.3d 268, 270 (7th Cir. 1994). The summary judgment standard should be applied "with added rigor in employment discrimination cases, where intent and credibility are crucial issues." *Courtney v. Biosound, Inc.*, 42 F.3d 414, 418 (7th Cir. 1994). However, where plaintiff cannot carry his burden of persuasion at trial on one or more of the elements of the cause of action, the court should grant summary judgment in favor of defendant. *Anderson*, 477 U.S. at 249-50.

The rules of this court require that the moving party serve and file "a short statement of material facts as to which the moving party contends there is no genuine issue and that entitle the moving party to a judgment as a matter of law." U.S. Dist. Ct., N.D. Ill., Gen.R. 12(M)(3). The opposing party is required to serve and file "a concise response to the movant's statement." U.S. Dist. Ct., N.D. Ill., Gen.R. 12(N)(3)(a). All material facts set forth in the movant's statement will be demmed admitted unless controverted by the opposing party. U.S. Dist. Ct., N.D. Ill. Gen.R. 12(N)(3)(B). The moving party may submit a concise reply to the opposing party's 12(N) statement in the form prescribed for a response. U.S. Dist. Ct., N.D. Ill., Gen.R. 12(M). (N)(3)(b). All material facts set forth in the opposing party's statement of the moving party. U.S. Dis. Ct., N.D. Ill., Gen.R. 12(M). Based on the documents the parties submitted in compliance with the forgoing rules, this court has found the following facts undisputed.

Plaintiff, Frank Sanders, is an Aftican-American male. He was hired as a part time police officer by defendant in 1991. Plaintiff worked for Dixmoor as a part- time police officer until he was suspended for ninety days by Chief Falica in April 1997. Plaintiff never returned to work after his suspension.

From 1991 until April 1997, Falica, a Caucasian, was plaintiff's supervisor at Dixmoor. On April 8, 1997, then police chief Nicholas Graves was fired and replaced by Falica as the new Chief of Police of the Village of Dixmoor. That night Falica had the locks on the doors of the police station changed. Although he was not scheduled to work, plaintiff went to the police station the following evening in order to help his friend Graves remove personal items from Graves' former office. Plaintiff met Graves at the station, but when they tried to enter through the rear door, plaintiff discovered that the locks had been changed and his key to the station did not work. After entering through the front door, Graves,

plaintiff, and another officer were accompained by chief Falica into the chief's office where plaintiff began collecting and boxing Graves' personal effects.

While plaintiff packed boxes, Falica and Graves engaged in conversation. Plaintiff interjected and asked Falica about the new scheduling procedures and what plaintiff's role would be under the new administration. Falica responded that this was not the time to discuss the matter. Plaintiff then told Falica he did not have a key and that he had been locked out, asking when he would receive a new key. Falica esponded again that this was not the time to discuss the matter. Plaintiff admits that he knew Falica wanted him to wait until he was through talking to Graves, but plaintiff defended his persistence saying that he was "at wits end" from being ignored. He elaborated, explaining that he "could never get anything out of" Falica and that Falica "always had an attitude" with him and "was always very short" with him. Plaintiff explained that he wanted to know if he was going to be working and if he would get a new key.

Plaintiff was angry with Falica for ignoring his questions, and the conversation started to heat up. Plaintiff reiterated that he worked there, and he demanded an answer to his questions. Plaintiff does not recall Falica's exact response; however, plaintiff persisted, stating that he had to have a key because he worked there. Falica told the plaintiff to "just shut up" until they were through. Plaintiff then exclaimed that he was a grown man and Falica could not tell him to shut up. Plaintiff again stated that he worked there. At this time Falica exclaimed, "Nigger, you're suspended," after which he opened the door and told the plaintiff to get out of the station. Plaintiff refused to leave, declaring that he was "not going anywhere." Falica reiterated, "You're suspended for 90 days. Get out of the station and give me your badge and ID card." Plaintiff stated, "I'm not giving you anything," and walked out of the station.

Prior to April 1997, plaintiff does not complain of any sort of racial harassment or mistreatment. Plaintiff concedes that April 9, 1997, was the only time Falica ever referred to him as "nigger," and plaintiff does not allege that Falica ever addressed him with any other racial epithet at any other time. Plaintiff's claim rests solely on the April 9, 1997, incident.

Plaintiff claims that Falica's statement addressing plaintiff as "nigger," is in itself a violation of Title VII of the Civil Rights Act of 1964. Plaintiff does not argue that he was suspended because of his race or that using the word "nigger" amounted to constructive discharge. Plaintiff is asserting a racial harassment or hostile work environment claim.

It is well established that a plaintiff may asssert a claim of racial harassment under Title VII. *Patterson v. McLean Credit Union*, 491 U.S. 164, 180 (1989); *Daniels v. Essex Group, Inc.*, 937 F.2d, 1264, 1270 (7th Cir. 1991); *Nazaire v. Trans World Airlines, Inc.*, 807 F.2d 1372, 1380 (1986). As the Supreme Court noted in *Patterson*, "harrassment which is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment is actionable under Title VII because it affects a term, condition, or privilege of employment." *Patterson*, 49 U.S. at 180 (citation omitted). "Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult." *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986) (citing *Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971)).

When evaluating a racial harassment claim under Title VII, the court applies the specific discriminatory facts alleged by plaintiff to the legal standards governing the existence of racial harassment. *Rogers v. Western-Southern Life Ins. Co.*, 12 F.3d 668, 674 (7th Cir. 1993). The court must examine claims of harassment in a hostile work environment against

both an objective and subjective standard. *Daniels*, 937 F.2d at 1271 (racial harassment claim); *Brooms v. Regal Tube Co.*, 881 F2d 412 (7th Cir. 1989) (sexual harassment claim). Rather that adopting a "multi-factor test that has the potential for a mechanical application that overlooks or underemphasizes the harassment inquiry," *Daniels*, 937 F.2d at 1271, the Seventh Circuit has adopted the two-part test which "allows us to consider the likely effect of a defendant's conduct upon a reasonable person's ability to perform his or work and upon his or her well-being as well as the actual effect upon the particular plaintiff bringing the claim. *Western-Southern*, 12 F.3d at 674. In addition, in order to hold an employer liable for the actions of its employee, the court must determine that the employer knew or should have known about its employee's actions and that it failed to take remedial action. *Brooms*, 881 F.2d at 421. Plaintiff fails to demonstrate conditions that a reasonable fact finder could conclude mounted to harassment under the objective standard. This court makes no determinations as to the subjective feelings of plaintiff or the knowledge and consequent duty of the employer. Plaintiff offers Chief Falica's statement, "Nigger you're suspended," as objective proof of racial harassment. In order for the court to conclude that the plaintiff has presented a valid harassment claim under the objective standard, it must determine that there is sufficient evidence to establish that Falica's statement would adversely affect the work performance and well-being of a reasonable person. *Western-Southern*, 12 F.3d at 674 (citing *Brooms*, 881 F.2d at 419). The court must analyze each case, conducting "a particularized inquiry into an employment environment that gives rise to racial harassment." *Daniels*, 937 F.2d at 1274. Because the court must examine the totality of the circumstances, it will "consider a range of factors to determine whether the objective standard has been ment." Id. This range of factors includes:

> [T]he nature of the alleged harassment, the

> background and experience of the plaintiff, [his] coworkers, and supervisors, the totality of the physical environment of the plaintiff's work area, the lexicon of obscenity that pervaded the environment of the workplace both before and after the plaintiff's introduction into its environs, coupled with the reasonable expectattion of the plaintiff upon voluntarily entering that environment.

Brooms, 881 F.2d at 419. The Seventh Circuit has repeatedly stated that there is "neither a threshold magic number of harassing incidents that gives rise, without more, to liability as a matter of law nor a number of incidents below which a plaintiff fails as a matter of law to state a claim." *Western-Southern*, 12 F.3d at 674; *Daniels*, 937 F.2d at 1273-1274.' However the Seventh Circuit has also made it clear that occasional or isolated instances of racial or ethnic slurs do not in and of themselves constitute a violation of Title VII. *Nazaire*, 807 F.2d at 1380; *Daniels*, 937 F.2d at 1270.

The single epithet Falica uttered is not enough to satisfy the objective prong of the hostile work environment enquiry. The use of the word was an isolated incident, and there are no other factors that could be taken into consideration, such as lack of experience or a generally offensive work environment, which would magnify the incident and raise the insult to the level of harassment actionable under Title VII. To the contrary, plaintiff is a seasoned police officer with more than a decade of service in a demanding profession, and there is no evidence that any Dunmoor supervisor or employee ever addressed plaintiff with a racial epithet before or after the April incident or that harassment ever occurred in any other form.

Plaintiff relies on Judge Plunkett's observation that "[t]he use of the word 'nigger' automatically separates the person addressed from every non-black person; this is

discrimination per se." *Bailey v. Binyon*, 583 F.Supp 923, (N.D.Ill. 1984). However, immediately after this statement, Judge Plunkett noted that although plaintiff could demonstrate discrimination, this did not necessarily mean that the discrimination was actionable under Title VII. Id. at 927 n.5. Moreover, the Supreme Court emphasized, "[N]ot all workplace conduct that may be described as 'harassment' affects a 'term, condition, or privilege' of employment within the meaning of Title VII." *Meritor Savings Bank, FSB, v. Vinson*, 477 U.S. 57, 65 (1986). Plaintiff also cites *Rogers v. Western-Southern Life Ins. Co.*, 12 F.3d 668, 675 (7th Cir. 1993), where the court found a racial harassment violation under Title VII based in part on the use of racial epithets by the employer. However, the *Western-Southern* court based its finding of racial harassment on much more extensive evidence than a single use of a racial epithet. See Id. While this court agrees that Falica's statement was inappropriate and discriminatory, it was not severe enough to affect a "term, condition, or privilege" of plaintiff's employment and justify a cause of action under Title VII.

Plaintiff fails to satisfy the objective prong of the hostile environment enquiry, and consequently fails to demonstrate an actionable claim of racial harassment under Title VII. Accordingly, defendant's motion for summary judgment will be granted.

ORDERED: The motion of defendant, Village of Dixmoor, Illinois, for summary judgment is granted. Judgment in favor of defendant and against plaintiff, Frank Sanders, will be set forth on a separate document and entered in the civil docket. Fed.R.Civ.P.58, 79(a).

ENTER:

/s/George W. Lindberg
United States District Judge

Supreme Court, U.S.
FILED
OCT 22 1999
CLERK

No. 99-511

In the Supreme Court of the United States

FRANK SANDERS,

Petitioner,

v.

VILLAGE OF DIXMOOR, ILLINOIS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING

The petition accurately lists the parties to the proceeding.

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STATEMENT OF THE CASE

The petition seeks this Court's review of the Seventh Circuit's opinion affirming the district court's grant of summary judgment in favor of respondent on petitioner's claim, under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e *et seq.*, that he was suspended from his position as a part-time police officer with respondent because of his race. Pet. 1.

Respondent moved for summary judgment on petitioner's complaint before the district court, noting that petitioner failed to present sufficient evidence of either a hostile work environment claim or a claim for direct discrimination. Pet. App. 2. In his three-page response, petitioner addressed only his hostile work environment claim and failed to address the issue of direct discrimination. Pet. App. 4. The district court thus noted that petitioner was not arguing a claim for direct discrimination but only one for a hostile work environment. Pet. App. 12. The district court then found that respondent was entitled to summary judgment. Pet. App. 15. Petitioner neither notified the district court that he was also arguing a claim for direct discrimination nor sought reconsideration of the district court's ruling. Pet. App. 3.

Instead, petitioner appealed to the Seventh Circuit, wherein he did not raise his hostile work environment claim but instead suggested that he had presented evidence of direct discrimination. Pet. App. 3. The Seventh Circuit affirmed, noting that petitioner had waived any argument against the district court's finding on the hostile work environment claim by not addressing it on appeal, and that he had waived any argument regarding direct discrimination by failing to alert the district court of the theory. Pet. App. 3, 4.

Petitioner's petition for rehearing and suggestion for rehearing en banc was denied.

REASONS FOR DENYING THE WRIT

Petitioner incorrectly frames the issue as whether the Federal Rules of Civil Procedure require the filing of a motion to reconsider to preserve for appellate review a district court's error in granting a motion for summary judgment, suggesting that such a motion must be filed in every case. However, the Seventh Circuit held only that petitioner had waived his argument regarding direct discrimination because he failed at *any* time to notify the district court that he was asserting such a claim. The filing of a Rule 59 motion to reconsider was simply offered by the Seventh Circuit as one way in which petitioner could have done so.

In fact, the Seventh Circuit indicated that if petitioner had notified the district court that he was asserting such a claim prior to judgment being entered or when the court entered judgment, he would not have had to file any motion because he would have preserved the issue for appeal. In any case, a Rule 59 motion is not applicable in connection with every summary judgment motion decided by a district court. Rather, such a motion is appropriate only where there is a manifest error of law or fact or the moving party intends to present newly discovered evidence. *Federal Deposit Ins. Corp. v. Meyer*, 781 F.2d 1260, 1268 (7th Cir. 1986); *Lewis v. United States*, 1991 U.S. Dist. LEXIS 6717 (1991).

The applicable case law, as noted by the Seventh Circuit, is to the effect that arguments in opposition to summary judgment not properly raised in the district court

are waived. *Manor Healthcare Corp. v. Guzzo*, 894 F.2d 919, 922 (7th Cir. 1990); *Libertes v. County of Cook*, 709 F.3d 1122, 1126 (7th Cir. 1983). Here, petitioner failed to raise before the district court, at any time, the argument regarding direct discrimination. Further, his claim that he "relied on direct evidence of race discrimination to oppose respondent's motion for summary judgment," Pet. 2, is disingenuous as the only evidence offered, the alleged statement by respondent's chief, would apply both to a claim of a hostile work environment and a claim of direct discrimination. However, before the district court, petitioner relied upon this evidence only to support his claim of a hostile work environment. Pet. Sec. 4. Therefore, there exists no basis upon which to grant his petition.

CONCLUSION

For the reasons given above, the petition should be denied.

Dated: October 22, 1999

Respectfully submitted,

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